No. [redacted] 16

NUMBER 22,698

In the Supreme Court of the United States

October Term, 1914

E. P. McCABE, et al,
Appellants,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al,
Appellees.

BRIEF FOR APPELLEES

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NUMBER 22,898

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E. P. McCABE, et al,
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THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.,
Appellees.

BRIEF FOR APPELLEES

STATEMENT.

We cannot agree to the statement of facts found in brief filed by appellants. This statement does not give proper consideration to the controlling factors in the disposition of the cause in the trial court and in the Circuit Cout of Appeals. We therefore prefer to present a concise

but complete statement of these issues from our own standpoint.

On the 15th day of February, 1908, the appellants filed their bill of complaint against the appellees, in the Circuit Court of the United States for the Western District of Oklahoma (Tr. 3-5). The jurisdiction of the Circuit Court of the United States as a court of the United States was invoked solely upon the ground of diversity of citizenship, although there were allegations in the body of the bill charging that the statute challenged was violative of the Oklahoma Enabling Act and the Federal Constitution.

On the 26th day of February, 1908, appellants filed their amended bill of complaint against the appellees (Tr. 6-9) in which they continue to rest the jurisdiction of the court upon diversity of citizenship of the parties litigant (Tr. 6), the allegation being that each of the complainants there, appellants here, is a resident of the Western District of the State of Oklahoma, and that each of the defendants there, appellees here, is a foreign corporation, stating specifically the state under the laws of which each of the appellees was incorporated.

For convenience throughout this brief appellants will be referred to as "plaintiffs," the position they occupied in the trial court, and appellees will be referred to as "defendants," the position they occupied in said court.

The bill charges, in substance, that the plaintiffs are

Negroes, descendants of the African race; that the defendants are common carriers of passengers, state and interstate, within the State of Oklahoma, and that the defendants are about to observe and comply with the provisions of the Oklahoma separate coach law. The gravamen of the complaint is found in the fifth paragraph of the bill, which is as follows:

> "That notwithstanding the terms of said Act of Congress which have been adopted into and become a part of the Constitution of the State of Oklahoma, the legislature of the State of Oklahoma passed an act entitled, 'An act to promote the comfort of passengers on railroads, etc.,' which act was declared an emergency act and was approved on the 18th day of December, 1907, and that the State of Oklahoma is now attempting to put said act in operation. That by said act it is among other things provided 'that every railway company, urban or suburban car company, street car or interurban car or railway company, lessee, manager or receiver thereof, doing business in this State as a common carrier of passengers for hire, shall provide separate coaches or compartments as hereinafter provided for the accommodation of the white and negro races, which separate coaches or cars shall be equal in all points of comfort and conveniences.' That said act further provides that separate waiting rooms and separate conveniences are to be provided for the white and colored races, and prevents any colored person or persons of African descent from having any of the facilities provided for white persons and requires separate facilities to be provided for persons of African descent and makes a distinction between persons of the white race and persons of African descent." (Tr. 7-8.)

Attention is directed to the fact that no complaint is made in this paragraph of the provisions of the law per-

mitting the hauling of sleeping cars, dining or chair cars to be used exclusively by either race.

Paragraph six of the bill charges that the separate coach law violates the Enabling Act in that it discriminates on account of race and color, and that it is in conflict with the Fourteenth Amendment to the Constitution of the United States in that it abridges privileges and immunities of plaintiffs as citizens of the United States and deprives them of their rights without due process of law. The grounds for equitable relief are found in the following allegations in paragraph six of the bill:

> "And your orators further charge that the acts and conduct of the defendants and each of them are being done under the provision of the State of Oklahoma above set out, and will be continuous and will work great hardships upon your orators and all persons of the negro race desiring to travel on railroads in the State of Oklahoma, and unless restrained and enjoined by your honors from carrying out the intended injury, a multiplicity of suits will ensue, there being at least fifty thousand persons of the negro race in the State of Oklahoma who will be injured and deprived of their civil rights unless so restrained by this honorable court." (Tr. 8-9.)

The relief prayed for is as follows:

> "To the end, therefore, that your orators may have that relief which they can only obtain in a court of equity and that said defendants may answer the premises, they now pray the court that the defendants and each of them be enjoined and restrained from in any manner constructing, maintaining or operating passenger trains and coaches, depots, waiting rooms and all other passenger service in the State of Oklahoma

in the manner provided by the Act of the Legislature above set out, or in any manner making distinctions in the race or color, in the conduct and operating of the passenger service and trains of the said defendants and each of them, and for such other and further relief as may be just and for costs." (Tr. 9.)

It is apparent that the relief sought is an injunction against constructing and maintaining separate and equal facilities as required by the separate coach law of the State of Oklahoma. It will be further observed that the bill contains no allegation of the amount in controversy, nor is there anything in the record from which it may be ascertained that the amount involved exceeds the sum of two thousand dollars, *Thompkins* v. *M. K. & T. Ry. Co.*, 211 Fed. 391.

An injunction was denied and the demurrers of the defendants to the bill sustained and the cause dismissed. From the judgment of dismissal the plaintiffs prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit. A motion was there presented to dismiss the appeal because of the absence from the bill of an averment of the jurisdictional amount (Tr. 37). The motion was denied by the Circuit Court of Appeals and the cause submitted upon the merits, and the judgment of the Circuit Court affirmed. (Tr. 62.) 186 Federal 966.

On the 15th day of July, 1911, an assignment of errors was filed and an appeal allowed to this court by Judge Walter I. Smith, one of the judges of the Circuit Court of

Appeals for the Eighth Circuit. The assignment of errors (Tr. 66) attempts to bring into the cause certain contentions found in the dissenting opinion of Judge Sanborn, but which were not made the basis of any relief prayed for in the bill.

For the convenience of the court the separate coach law of Oklahoma is printed as Appendix "A" to this brief and, inasmuch as the Mississippi separate coach law has been the subject of full consideration, this law is likewise, for the convenience of the court and for comparative purposes, printed as Appendix "B."

POSITION AND CONTENTION OF DEFENDANTS.

The defendants have carried, and must in the future continue to carry, the chief burdens of the separate coach law of the State of Oklahoma. They, however, are common carriers engaged in the transportation of passengers and freight, state and interstate, within the State of Oklahoma. The public sentiment of the state, as evidenced by the separate coach law thereof, demands a separation of the white and negro races by transportation companies. The law not only requires of such transportation companies the maintenance of separate facilities at stations and on trains for the accommodation of the races separately, but imposes upon the carriers the duty of seeing that each of the races are assigned to the facilities provided for such race. Notwithstanding the separate coach law is a burden upon the

defendants, they have consistently, and now insist, upon the validity and constitutionality of said act. They insist that, properly interpreted, the act relates only to intrastate commerce, and is not violative of the Commerce Clause of the Federal Constitution. They insist that the act provides for facilities equal in points of convenience and comfort for both races; that the fact that it does not require identical facilities for both races does not render it violative of the Fourteenth Amendment to the Federal Constitution, nor does the authority to haul sleeping, dining, and chair cars, for either race when business conditions justify and demand it, constitute a discrimination against the race the travel of which would not justify such facilities even if no separate coach law were involved. Defendants have, however, felt that the State of Oklahoma in its sovereign capacity is vitally interested in the legislation here involved. Each time the cause has been submitted they have notified the Attorney General of the State and have asked him to participate in the presentation of the cause.

Upon such notice and invitation the Attorney General has filed a brief in this cause as of counsel for defendants, the purpose of which, however, is to submit the views and contentions of the State of Oklahoma in relation to the law. As such counsel the Attorney General has been invited to participate in the oral argument on behalf of the defendants and to share the time allotted to counsel for defendants under the rules of the court. Counsel for defendants has grave doubt as to the jurisdiction of this court to entertain

the appeal. No motion has been made to dismiss the appeal, nor is there any desire to avoid a disposition of the cause on the merits. It is felt, however, that good faith to the court requires that the court's attention be directed to the question of jurisdiction in order that such question may be considered and disposed of as the court may see fit.

Has this Court jurisdiction to entertain the appeal?

Defendants submit the question of this court's jurisdiction with the suggestion that the bill contains no allegation that the value of the rights involved amounts to the sum of two thousand dollars, or any other sum, nor was the jurisdiction of the trial court invoked upon any other ground than diversity of citizenship. Was not, therefore, the judgment of the Circuit Court of Appeals final?

26 Stat. 828, chapter 517.
Shulthis v. *McDougal*, 225 U. S. 561.
Arbuckle v. *Blackburn*, 191 U. S. 405.
Hanford v. *Davies*, 163 U. S. 274.
Bonin v. *Gulf Co.*, 198 U. S. 115.
Shoshone Mining Co. v. *Rutter*, 177 U. S. 505.
Florida Central Co. v. *Bell*, 176 U. S. 321.

The Oklahoma Separate Coach Law is not violative of Section 8 of Article 1 of the Constitution of the United States.

Section 1 of the Oklahoma separate coach law is as follows:

"Every railway company, urban or suburban car company, street car or interurban car, railway company,

> lessee, manager or receiver thereof, doing business in this state, as a common carrier of passengers for hire, shall provide separate coaches or compartments, as hereinafter provided, for the accommodation of the white and negro races, which separate coaches or cars shall be equal in all points of comfort and convenience."

Rev. Laws of Oklahoma, 1910, Section 860, Appendix A.

If the State of Oklahoma has the right to prescribe separate coaches for interstate passengers, and the language of the act may be fairly construed as applicable to such passengers, then it should be held applicable to interstate passenger transportation. If the State of Oklahoma may not lawfully prescribe separate coaches for interstate passengers, the act should be limited in its application to intrastate passengers, if a reasonable interpretation of the language renders such a solution possible.

The concluding paragraph of Section 34 of Article 9 of the Oklahoma Constitution is as follows:

> "The provisions of this article shall always be so restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation had been herein expressed in each case."

Article 9 of the Oklahoma Constitution deals with the subject of the regulation of transportation and transmission companies doing business in the state. The paragraph quoted is a command to the legislature to enact no legislation which conflicts with the Federal Constitution. The Supreme Court of the State has not been called upon to

determine whether the Oklahoma separate coach law applies to interstate passengers. It has, however, forecasted what its conclusions will be in other cases involving very similar questions from which it is manifest that the law will be held applicable only to intrastate passengers.

Atchison, Topeka & Santa Fe Ry. Co. v. *State* (Okla.), 124 Pac. 56, 33 Okla 158.
Atchison, Topeka & Santa Fe Ry. Co. v. *State* (Okla.), 124 Pac. 57, 33 Okla 105.

The rule is so well established that if a statute is capable of more than one interpretation, one of which will render it invalid and the other valid, that it is the duty of the Court to give that interpretation which will sustain its validity that authorities need not be cited in support thereof. Therefore, if the Oklahoma Separate Coach Law is capable of being interpreted as applicable to both inter and intrastate passengers, or to intrastate passengers only, and that to construe it so as to make it applicable to interstate passengers will destroy its validity, it is the duty of the Court to construe it as applicable to intrastate passengers alone.

The Supreme Court of Louisiana in the case of *ex rel Abbott* v. *Hicks*, 44 La. Annual 74, 11 So. 74, held the Louisiana Separate Coach Law, which is as broad as the Oklahoma Separate Coach Law, applicable to intrastate passengers only.

The Supreme Court of Mississippi in the case of *Louisville, etc., Railway Co.* v. *State*, 6 So. 203, held the Missis-

sippi Separate Coach Law applicable alone to intrastate passengers. The language of the Mississippi statute is as broad as that of the Oklahoma statute.

This Court affirmed the decision of the Supreme Court of Mississippi in the case referred to, and approved the reasoning by which the Mississippi act was limited in its application to intrastate passengers. *Louisville, etc., Ry. Co.* v. *Mississippi*, 133 U. S. 587. The Court of Appeals of Kentucky in the case of *Ohio Valley Ry's., Receivers,* v. *Lander et al.*, 47 S W. R. 344, sustained the validity of the Kentucky Separate Coach Law, and held it applicable to intrastate passengers only. In disposing of the contention that the Kentucky Separate Coach Law was a regulation of interstate commerce, the Kentucky Court of Appeals used the following language:

> "It is insisted for appellee that the act under consideration undertakes to regulate or control as to interstate passengers, and that portion of the statute is invalid, as being in conflict with the interstate commerce clause of the United States Constitution, and that the act is inseparable, and therefore it must all be held invalid. We do not think that such contention is tenable. It seems to us that such contention is in conflict with the decision, hereinbefore referred to, of the Supreme Court of the United States in the case of *Louisville, N. O. & T. Ry. Co.* v. *Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348, and also in conflict with the well-settled rules of construction. If it were conceded (which is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the

state, and therefore it should be held valid as to such passengers. It seems to us that a passenger taking passage in this state, and railroad companies receiving passengers in this state, are bound to obey the law in respect to this matter, so long as they remain within the jurisdiction of the state."

This Court in the case of *Pacific Express Company* v. *Seibert,* 142 U. S. 339, interpreting the language "business done within this state," found in Section 2 of the Act of the Legislature of Missouri of May 16, 1889, uses the following language:

"The question on this point, therefore, is narrowed down to the single inquiry, whether the tax complained of in any way bears upon or touches the interstate traffic of the company, or whether, on the other hand, it is confined to its *intrastate* business. We think a proper construction of the statute confines the tax which it creates to the intrastate business, and in no way relates to the interstate business of the company. The act in question, after defining in its first section what shall constitute an express company or what shall be deemed to be such in the sense of the act, requires such express company to file with the state auditor an annual report 'showing the entire receipts for business done *within this State* of each agent of such company doing business *in this State,*' etc., and further provides that the amount which any express company pays 'to the railroads or steamboats *within this State* for the transportation of their freight *within this State* may be deducted from the gross receipts of the company on such business;' and the act also requires the company making a statement of its receipts to include, as such, all sums earned or charged 'for the business done *within this State,*' etc. It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other States and the State of Missouri, ex-

pressly limit the tax to receipts for the sums earned and charged for the *business done within the State.* This positive and oft-repeated limitation to business done within the State, that is, business begun and ended within the State, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the Company. 'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce."

Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, in the case of *Butler Brothers Shoe Company* v. *United States Rubber Company,* 156 Fed. 18, uses the following language:

"There is, however, another view of this case which is both reasonable and persuasive. The law upon the subject which has been considered was the same when the Colorado Constitution was adopted and when her statutes were enacted that it is today, and the legal presumption, in the absence of persuasive evidence of another purpose, is that the people and the Legislature of that state intended in the adotion of this Constitution and the enactment of these laws to obey the supreme law of the land, that they intended to prohibit the doing of intrastate business only, and the exercise by foreign corporations of corporate power unauthorized by the Constitution and laws of the United States, and that only, without a license from their state. Hence, this Constitution and these statutes should be read and interpreted, if possible, in the light of this presumption, so that they will not conflict with the Constitution and the laws of the United States. The Supreme Court

seems to have been inclined to a liberal interpretation of this nature, for in *Fritts* v. *Palmer,* 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317, the foreign corporation had clearly violated the plain terms of the Colorado statute. It had exercised corporate power in that state. It had acquired, held, and conveyed real estate in violation of the legislation of that state, and yet the court sustained the title. The Supreme Court of Colorado construed this legislation in this rational spirit when it held that a single act of business did not come within the purview of some of these statutes (*Kindel* v. *Lithographing Co.*, 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; *Roseberry* v. *Valley Building & Loan Ass'n.*, 83 Pac. 637), although by their express terms they prohibited a single exercise of corporate power and a single act of business as imperatively as they forbade many. An interpretation of this legislation so that it may conform to the national law, and so that acts done in undoubted violation of its plain terms may be held to be without its true meaning and purpose, is rational and just and it is supported by high authority. *Harris* v. *Runnels*, 12 How. 79, 84, 13 L. Ed. 901; *National Bank* v. *Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Coit* v. *Sutton*, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819; *Oakland Sugar Mill Co.* v. *Fred W. Wolf Co.*, 118 Fed. 239, 243, 55 C. C. A. 93; *Watrous & Snouffner* v. *Blair*, 32 Iowa 58; *Pagborn* v. *Westlake*, 36 Iowa 546, 548; *Chattanooga R. & R. Co.* v. *Evans*, 66 Fed. 809, 815, 816, 14 C. C. A. 116, 121, 122."

The opinion of the Circuit Court of Appeals in this case is in reason conclusive of the contention that the Oklahoma Statute applies to intrastate passengers only. In reason and under the authorities the Oklahoma Statute should be interpreted as applicable to intrastate passengers only. The bill in fact presents no charge that the statute is applicable to interstate passengers.

The State of Oklahoma, through its Attorney General, is here insisting that the proper interpretation of the statute is to limit it in its application to intrastate passengers. The natural and, it seems to us, the necessary interpretation of the Oklahoma Separate Coach Act is to hold it applicable to intrastate passengers only.

Plaintiffs do not charge that the Oklahoma Separate Coach Law will be applied by the railway companies to interstate passengers or that they or either of them will suffer any damage or wrong because of the application of said Act to interstate passengers.

The bill does not allege that the Railway Companies contemplate applying or will apply the Separate Coach Statute to interstate passengers. Nor does it charge that the plaintiffs have suffered or will suffer any wrong or injury by the defendants' applying the Oklahoma Statute to interstate passengers. They have not alleged such a state of facts as entitles them to the judgment of this Court upon the question as to whether or not such statute is a regulation of interstate commerce. *So. Ry. Co.* v. *King*, 217 U. S. 524; *Thompkins* v. *M. K. & T. Ry Co.*, 211 Fed. 391.

This Court should not pass upon the constitutionality of a State Statute as violative of the Federal Constitution until there is a direct charge of the violation of the plaintiffs' right in that respect. To hold the Oklahoma Separate Coach Law is violative of the Commerce Clause of the Con-

stitution, under the allegations found in the bill, would be a mere matter of speculation. It would be an adjudication of invalidity upon the possibility that a wrong might be perpetrated, but not upon the ground that an injury had been, or would necessarily be suffered.

The constitutionality of Separate Coach Law not affected by provisions of Enabling Act.

The first paragraph of section 3 of the Enabling Act is as follows:

> "That the delegates to the convention thus elected shall meet at the seat of government of said Oklahoma Territory on the second Tuesday after their election, excluding the day of election in case such day shall be Tuesday, but they shall not receive compensation for more than sixty days of service, and, after organization, shall declare, on behalf of the people of said proposed State, that they adopt the Constitution of the United States; whereupon the said convention shall, and is hereby authorized to, form a constitution and State government for said proposed State. The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

This paragraph is directed to the Constitutional Convention and Constitution makers. The question of whether or not it had been complied with was submitted to the President of the United States in accordance with the provisions of the Enabling Act, and he had to determine the same in the affirmative before he could issue his proclamation

admitting Oklahoma to statehood. After the issuance of that proclamation the provision referred to had served the purpose for which it was inserted in the Enabling Act. It is not addressed to the subsequent legislative bodies of the State of Oklahoma, nor to the people of the State of Oklahoma. It would be strange indeed to give this provision of the Enabling Act a construction not in keeping with the language thereof, and the result of which would be to deprive the sovereign State of Oklahoma of the exercise of the police control in its local affairs that is enjoyed by all of the other states of the Union, when by the specific terms of the Enabling Act it is admitted upon an equal footing with the other states of the Union. It is respectfully submitted that there is nothing whatever in the contention that the Enabling Act prohibited the legislature from making a distinction on account of race or color, or that the separate coach law of Oklahoma does make a distinction on account of race or color. *Permoli* v. *First Municipality*, 3 How. 589, 609; *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 688; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1; *Ward* v. *Race Horse*, 163 U. S. 504; *Bolln* v. *Nebraska*, 176 U. S. 83.

The Separate Coach Law of Oklahoma does not conflict with the Fourteenth Amendment to the Constitution of the United States.

The authority of a State to require a separation of the races traveling by common carrier between stations within

its border is authoritatively settled by an unbroken line of decisions of this court.

Louisville, New Orleans & Texas Ry. Co. v. *Miss.*, 133 U. S. 587.
Plessy v. *Ferguson*, 163 U. S. 537.
Chesapeake & Ohio Ry. Co. v. *Kentucky*, 179 U. S. 388.

And likewise the right of the carrier to prescribe reasonable rules and regulations for a division of the races has been sustained by this court. *Chiles* v. *Chesepeake & Ohio Ry. Co.*, 218 U. S. 71; and by other courts, *Thompkins* v. *Missouri, Kansas & Texas Ry. Co.* 211 Fed. 391.

Apparently, the general theory of the plaintiffs is that they are protected and guaranteed equal social rights by the Enabling Act, if not by the Fourteenth Amendment to the Constitution of the United States; that the Oklahoma separate coach law is a violation of such social rights; and that for that reason, if for no other, they are entitled to have the observance of the law by the defendants enjoined.

The matter of the separation of the races in public places and especially in transportation facilities is vital to the people of the southern states. It is a practical condition with them and not a theoretical question. It is a situation that can be dealt with only from a practical standpoint. It is a situation that this court has said the several states have a right to deal with by law prescribing reasonable regulations. The authority to enact generally a separate coach

law has been sustained by this court both upon principle and authority. In the case of *Plessy* v. *Ferguson*, 163 U. S. 537, *supra*, this court, discussing the principles involved, uses the following language:

> (p. 551) "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature and should enact a law in precisely similar terms, it would thereby regulate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudicies may be overcome by legislation, and that equal rights can not be secured to the negro except by an enforced commingling of the two races. We can not accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People* v. *Gallagher*, 93 N. Y. 348, 448: 'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil

and political rights of both races be equal one can not be inferior to the other, civilly or politically. If one race be inferior to the other socially, the Constitution of the United States can not put them upon the same plane."

The statute, in addition to the ordinary separate coach law provisions, contains a further provision that authorizes the carriers to haul Pullman cars, dining cars, and chair cars for either race. There is no charge made in the bill of complaint that there is any discrimination against persons of African descent arising out of the authority granted to the railway companies under this section of the act. The members of the legislature of the State of Oklahoma were undoubtedly familiar with the character and extent of travel of persons of African descent in the State of Oklahoma and were of the opinion that there was no substantial demand for Pullman car and dining car service for persons of the African race in the intrastate travel in the State of Oklahoma. *Corporation Commission of Oklahoma* v. *A. T. & S. F. Ry. Co.*, 25 I. C. C. Rep. 120. This practical experience was no doubt gathered from their travel on trains of the several carriers in the State of Oklahoma. This view of the matter is borne out by the fact that there is no allegation in the bill charging any discrimination on account of the hauling by the carriers of Pullman cars, dining cars and chair cars for the members of either race. Perhaps so far as the chair cars are concerned no assumption of discrimination should arise from the permission to haul these for either

race. There is no allegation that the coaches are not equal in point of comfort and convenience to the chair cars. In fact a Pullman car, in so far as day travel is concerned, affords no greater comfort or convenience for day travel than do the coaches in use in Oklahoma.

It is a public fact, of which this court might well take knowledge, that the day coaches in use on the main lines of the railway companies in the State of Oklahoma, where Pullman cars are hauled, are first class in every particular and equal in pointt of comfort and convenience to any coach or car of any character hauled on any train in the state. They are altogether superior to the day coach used on the average eastern line.

Of the railway lines involved, two haul dining cars and four Pullman cars, which, so far as intrastate traffic is concerned, are hauled for the accommodation of the white race. One of the defendants hauls neither Pullman cars nor dining cars. These facts are not shown in the record, but the defendants prefer a judgment upon the facts as they exist. In order that this may be done, defendants further state (although these facts are not contained in the record) that immediately following the enactment of the separate coach law in Oklahoma, which was made effective upon the date of its approval by the Governor, there was some complaint as to the adequacy of the facilities by both races and an emergency existed which could not be instantly met. This condition, however, was remedied as rapidly as

possible and to the satisfaction of the great majority of the persons of African descent in the state.

It is respectfully submitted that the main contention in relation to the matter of discrimination and, in so far as it relates to Pullman and dining cars, had its origin in the dissenting opinion of Circuit Judge Sanborn in this cause. Practically, persons of African descent had found no reason to complain of the Pullman car and dining car service for the white race. In Judge Sanborn's dissenting opinion they found a theoretical basis for such complaint. This is said without any disrespect to Judge Sanborn or his opinion in this cause. For him personally, and for his ability as a jurist, we have the greatest admiration. From his environment he has come in contact only with the theoretical side of this extremely practical question. However, for Judge Sanborn's present views see *Thompkins* v. *Missouri, Kansas & Texas Ry. Co.*, 211 Fed. 391.

As to divisibility of Statute

Appellees agree with appellants that the statute must stand or fall as a whole; that the legislature of Oklahoma would never have enacted a law requiring the hauling of separate Pullman cars and separate dining cars for the white and colored races each. Such a requirement would have rendered intrastate passenger transportation so expensive as to constitute an extreme burden upon both the railways and the people of the state. Neither would the legislature have provided for separate facilities as to the chair cars and day coaches and required the joint use of sleeping cars by both races. We, therefore, agree that,

if any part of the statute is invalid, the entire statute must fall; but we respectfully insist that the statute as a whole is valid; that the bill of complaint in this case neither makes claim nor proceeds upon the basis that substantial inconvenience, wrong or harm will result to persons of African descent from a fair administration of the Oklahoma separate coach law.

The holding of this statute violative of the federal constitution and void would be a matter of gravest concern to the people of the State of Oklahoma. It should not be done upon conjecture as to possible injury or deprivation of theoretical rights.

We respectfully submit that for the reasons above stated, as well as for those found in the opinion of the Circuit Court of Appeals for the Eighth Circuit, *McCabe* v. *Railway Co.*, 186 Fed. 966, the authority given to the railway companies to haul, and their hauling of Pullman cars and dining cars, for the white race only does not violate the constitutional rights of the plaintiffs.

Respectfully submitted,

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APPENDIX A

COACH LAW

SEPARATE COACHES—WAITING ROOMS.

ARTICLE I.

AN ACT to promote the comfort of passengers on railroads, street cars, urban, suburban, interurban cars and at railway stations, requiring all railway companies, street cars, urban, suburban, interurban car companies, carrying passengers on their trains or cars within this State, to provide equal but separate coaches or compartments, and separate waiting rooms at stations or depots, so as to secure separate accommodations; defining the duties of officers of such railway, street car, urban, suburban, or interurban car company; directing them to assign passenger to coaches or compartments set aside for the use of the race to which said passenger belongs; authorizing them to refuse to carry on their trains or cars such passengers as may refuse to occupy the coaches or compartments to which he or she is assigned, to exonerate such railway, street car, urban, suburban or interurban car company from any of the blame or damage that may proceed or result from such refusal; to provide penalties for the violation of this act, and declaring an emergency.

Be it Enacted by the People of the State of Oklahoma:

Section 1. That every railway company, urban, or suburban car company, street car or interurban car railway company, lessee, manager or receiver thereof, doing business in this State, as a common carrier of passengers for hire shall provide *separate coaches* or compartments, as hereinafter provided, for the accommodation of the white and negro races, which separate coaches or cars shall be equal in all points of comfort and convenience.

Section 2. Every railroad company, street car com-

pany, urban, suburban, or interurban car company, shall provide for and maintain separate waiting rooms at all their passenger depots for the accommodation of the white and negro races, which separate waiting rooms shall be equal in all points of comfort and convenience. Each waiting room shall bear in conspicuous place words in plain letters indicating the race for which it is set apart. It shall be unlawful for any person to use, occupy or remain in any waiting room, toilet room, or at any water tank in any passenger depot in this State, set apart to a race to which he does not belong.

Section 3. The term negro as used herein, includes every person of African descent, as defined by the Constitution.

Section 4. Each compartment of a railway coach divided by good and substantial wooden partition, with a door therein shall be deemed a separate coach within the meaning of this Act, and each separate coach shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart; and each compartment of an urban or suburban car company, interurban car or railway company, or street car company, divided by a board or marker, placed in a conspicuous place, bearing appropriate words in plain letters, indicating the race for which it is set apart, shall be sufficient as a separate compartment within the meaning of this Act.

Section 5. Any railway company, street car company, urban or suburban car company, or interurban car or rail-

way company, lessee, manager or receiver thereof, which shall fail to provide its cars, bearing passengers, with separate coaches or compartments as above provided, or fail to provide and maintain separate waiting rooms as provided herein, shall be liable for each and every failure to a penalty of not less than one hundred nor more than one thousand dollars, to be recovered by suit in the name of the State, in any Court of competent jurisdiction, and each trip run with such railway train, street car, urban, suburban or interurban car without such separate coach or compartment shall be deemed a separate offense.

Section 6. If any passenger upon a railway train, street car, urban, suburban or interurban car provided with separate coaches or compartments as above provided shall ride in any coach or compartment not designated for his race, after having been forbidden to do so by the conductor in charge of the train or car, or shall remain in any waiting room not set apart for the race to which he belongs, he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five nor more than twenty-five dollars.

Should any passenger refuse to occupy the coach or compartment or room to which he or she is assigned by the officer of such railway company, said officer shall have the power to refuse to carry such passenger on his train, and should any passenger or any other person not passenger, for the purpose of occupying or waiting in such sitting or waiting room not assigned to his or her race, enter said room,

said agent shall have the power and it is made his duty to eject such person from such room, and for such neither they nor the railroad company which they represent, shall be liable for damages, in any of the courts of this State.

Section 7. The provisions of this Act shall not be so construed as to prohibit officers having in custody any person or persons, or employees upon the trains or cars in the discharge of their duties, nor shall it be construed to apply to such freight trains as carrying passengers in cabooses, provided that nothing herein contained shall be construed to prevent railway companies in this State from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately but not jointly.

Section 8. Every railway company carrying passengers in this State shall keep this law posted in a conspicuous place in each passenger depot and in each passenger coach provided in this law.

Section 9. That nothing in this Act shall be construed to prevent the running of extra or special trains or cars for the exclusive accommodation of either white or negro passengers, if the regular trains or cars are operated as required by this Act and upon regular schedule.

Section 10. Conductors of passenger trains, street cars, urban, suburban or interurban lines provided with separate coaches or compartments shall have the authority to refuse

any passenger admittance to any coach or compartment in which they are not entitled to ride under the provisions of this Act, and the conductor in charge of the train, street car, urban, suburban or interurban car, shall have authority and it shall be his duty to remove from the train, coach, street car, urban, suburban or interurban car, any passenger not entitled to ride therein under the provisions of this Act; upon his refusal to do so knowingly shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty nor more than five hundred dollars, and the company, manager, agent, conductor, receiver or other officer, shall not be held for damages of any lawful removal of a passenger as provided herein.

Section 11. All fines collected under the provisions of this law shall go to the available common school fund of the county in which the conviction is had. Prosecutions under the provisions of this law may be instituted in any court of competent jurisdiction, in any county through or into which said railroad, urban, suburban, interurban railway may be run or have an office.

Section 12. An emergency exists for the preservation of the public safety by reason whereof this Act shall take effect sixty days from and after its passage and approval.

Approved December 18, 1907.

APPENDIX B

THE SEPARATE COACH LAW OF MISSISSIPPI.

(Sustained by the Supreme Court of the United States in the case of *Louisville, etc., R. R. Co.* v. *Mississippi*, 133 U. S. 587.)

Section 1. BE IT ENACTED, That all railroads carrying passengers in this State (other than street railroads) shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations.

Section 2. That the conductors of such passenger trains shall have power, and are hereby required, to assign each passenger to the car or the compartment of a car (when it is divided by a partition) used for the race to which said passenger belongs; and that should any passenger refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train, and neither he nor the railroad company shall be liable for any damages in any event in this State.

Section 3. That all railroad companies that shall refuse or neglect within sixty days after the approval of this act to comply with the requirements of section one of this act shall be deemed guilty of a misdemeanor, and shall, upon conviction in a court of competent jurisdiction, be fined not more

than five hundred dollars; and any conductor that shall neglect to, or refuse to carry out the provisions of this act shall, upon conviction, be fined not less than twenty-five nor more than fifty dollars for each offense.

Section 4. That all acts and parts of acts in conflict with this act be, and the same are hereby repealed, and this act to take effect and be in force from and after its passage.